In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 976

DELORES WATKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1966. Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to Sunday, January 15, 1967, and on January 16, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

After petitioner's trial, an Illinois court held that evidence obtained by use of an electronic device car-

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ried by one party to a conversation was, under an Illinois statute, inadmissible against the non-consenting party although not illegally obtained. The question presented is whether that ruling requires reversal of petitioner's conviction, because the testimony of an informant as to conversations he had with petitioner was corroborated by the testimony of federal agents who had overheard those conversations by means of a transmitter carried by the informant.

STATUTE INVOLVED

Article 14 of the Illinois Criminal Code of 1961, Ill. Stat. Ann. ch. 38, art. 14 (Smith-Hurd), provides in pertinent part:

> § 14–1
> (a) Eavesdropping device.
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means * * *.
>
> * * * * *
>
> § 14–2
> A person commits eavesdropping when he:
> (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto * * *.
>
> * * * * *
>
> § 14–4
> Any person convicted of eavesdropping shall be fined not to exceed $1,000 or imprisoned in

a penal institution other than the penitentiary not to exceed one year, or both.

§ 14–5

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial * * *.

STATEMENT

Petitioner and two others, Chester Jones and Raymond Jones, were convicted by a jury in the United States District Court for the Northern District of Illinois under a five-count indictment charging that from November 20, 1961 to December 12, 1961, they engaged in a conspiracy to violate federal narcotics laws; that on December 20, 1961, they illegally concealed and sold 15 grams of heroin in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a); and that on November 30, 1961, petitioner and Chester Jones illegally concealed and sold 35 grams of heroin in violation of the same statutes. On October 7, 1964, petitioner was sentenced to five years' imprisonment on each of the five counts, the sentences to run concurrently.[1] The court of appeals affirmed the conviction.

The evidence pertinent to the issue petitioner raises reveals the following. On the night of November 20, 1961, in a Chicago bar, petitioner participated in a sale

[1] Chester Jones was sentenced to five concurrent twelve-year terms; Raymond Jones was sentenced to three concurrent five-year terms. Petitioner was later convicted, in a separate trial, for a narcotics offense that occurred in March 1964. *Watkins* v. *United States*, No. 977, this Term, petition for certiorari pending.

of heroin to one Houston Garner. Garner, an informant working with agents of the Bureau of Narcotics, was, at the time of the sale, wearing a Fargo radio transmitter which broadcast his conversations to a nearby federal agent who was equipped with a receiver (Tr. 3–24, 123–136, 315–325). On November 25, 1961, Garner telephoned petitioner from his office, and they discussed a contemplated future sale of heroin. The telephone conversation was overheard by a federal agent who had been invited by Garner to listen to the discussion on an extension telephone (Tr. 29–31, 116–117, 147–149, 201–202). In the early morning hours of November 30, 1961, on a Chicago street, petitioner participated in a second sale of heroin to Garner, and again the conversation was radioed to a nearby agent by means of the Fargo transmitter carried by Garner (Tr. 43–53, 168, 172–173, 178–181, 278–283, 336–341). The discussion was also overheard, without electronic aid, by a second agent who was hiding, with Garner's permission, in the trunk of Garner's automobile (Tr. 45–49, 87, 173, 179, 336).

At petitioner's trial in October 1964, Garner testified concerning the transactions and conversations with petitioner that had occurred on November 20 and November 30, and related the telephone conversation of November 25 (Tr. 123–136, 147–149, 168, 172–173, 178–181, 201–202). The agents who had overheard the three conversations testified concerning their surveillance, stated that they had recognized petitioner's voice, and described the colloquies which had taken place (Tr. 3–24, 29–31, 43–51, 116–117, 315–325, 336–341). Petitioner's counsel objected to the agents'

testimony, but the transcript does not reveal the basis for the objections.

ARGUMENT

Petitioner's Fourth Amendment rights were not violated by the informant's use of a device which made it possible for the conversations to be overheard.[2] *Osborn* v. *United States,* decided December 12, 1966, No. 29, this Term; *Lopez* v. *United States,* 373 U.S. 427; *On Lee* v. *United States,* 343 U.S. 747. Petitioner contends that this case does not fall within the ambit of the cited decisions because the manner in which the agents overheard the conversations constituted a criminal offense under the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code of 1961), and consequently that this Court, in the exercise of its supervisory power, should not permit her conviction to stand. The agents' actions, however, and the actions of the informant, were not in violation of the Illinois statute either as it was interpreted at the time of the occurrences in question here, or as it is interpreted at the present time.

The statute proscribes the use of an eavesdropping device to hear a conversation "without the consent of any party thereto." Ill. Stat. Ann. ch. 38, § 14–2

[2] Neither the Fourth Amendment nor Section 605 of the Communications Act of 1934 (47 U.S.C. 605) was breached by the agent's use of an extension telephone, with the informant's consent, to overhear the November 25 conversation with petitioner. *Rathbun* v. *United States,* 355 U.S. 107. Nor was this in violation of Illinois law. An extension telephone is not an eavesdropping device within the meaning of the Illinois statute. *People* v. *Dixon,* 22 Ill. 2d 513, 516, 177 N.E. 2d 224, 226, certiorari denied, 368 U.S. 1003.

(Smith-Hurd). On September 22, 1961, two months prior to the conversations here involved, the Illinois Supreme Court interpreted the above language to mean that, if consent is first obtained from one of the parties to the conversation, the statute is not violated. *People* v. *Dixon,* 22 Ill. 2d 513, 516, 177 N.E. 2d 224, 226, certiorari denied, 368 U.S. 1003. Consequently, in November 1961, the federal agents, who first obtained the consent and active cooperation of the informant, were able to act with the assurance that in monitoring the conversations they were engaging in no impropriety under Illinois law.

On March 24, 1966, more than four years after the monitoring, and more than one year after petitioner's trial, the Illinois Supreme Court overruled so much of the *Dixon* opinion as had indicated that monitoring with the consent of one party to a conversation would permit the evidence obtained to be introduced against another party whose consent had not been obtained. *People* v. *Kurth,* 34 Ill. 2d 387, 216 N.E. 2d 154. Contrary to petitioner's contention (Pet. 7, 9), however, the court did not hold that monitoring with the consent of only one party was in violation of the statute; it rejected this construction and held merely that evidence so obtained was intended by the legislature to be admissible only against the consenter (216 N.E. 2d at 158). Consequently, the agents' obtaining of evidence by the means here involved was not then, and would not now be, a violation of Illinois law. Thus there is no reason to consider imposition of the sanctions urged by petitioner as a matter of this court's supervisory authority. See *Lopez* v.

United States, 373 U.S. 427, 440. And the mere fact that such evidence would now be inadmissible under Illinois state law at an Illinois trial[3] is irrelevant to its admissibility in a federal criminal proceeding. *Wolfle* v. *United States*, 291 U.S. 7, 12–13; Rule 26, F.R. Crim. P.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Even under Illinois law, reversal of petitioner's conviction would not necessarily be required, since evidence of petitioner's conversations was also supplied at trial through the testimony of the informant and through the testimony of the agent who had hidden in the trunk of the informant's automobile. See *People* v. *Rhodes*, 71 Ill. App. 2d 150, 217 N.E. 2d 123 (1966).

[4] Even assuming, despite the circumspect opinion in *Kurth*, that all eavesdropping is now *illegal* in Illinois, there would be no reason to disturb this earlier federal conviction involving conduct plainly not in violation of the statute as it had been interpreted at the time.

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